CAFA, MDL'S AND THE ANATOMY OF BELLWETHER TRIALS IN FEDERAL COURTS[1]

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After the passage by Congress of the Class Action Fairness Act ("CAFA") in 2005, there has been a marked increase in the number of class actions filed in federal courts. Even when federal courts may not certify a class, they nevertheless often retain jurisdiction of the matter if jurisdiction was properly based on CAFA at the time of filing or removal.[2] As class certification of putative class actions seeking damages for personal injury or property damage has become increasingly rare in federal courts the use of the multidistrict litigation process (MDL) appears to be emerging as the favored vehicle by which to resolve mass tort litigation in federal court.[3] And, MDL judges rely more and more on the use of bellwether[4] trials as a primary tool to settle complex litigation. Thus, the lawyer who defends a mass tort MDL must first defeat class certification, but then recognize that the procedure for selection and trial of bellwether claims will have dramatic effect on the ultimate court intended resolution of the litigation which, in the absence of outright dismissal by motion practice, is a settlement.

The Impact and Supporting Data of CAFA on Class Action Filings in the Federal Courts

After the passage of the Class Action Fairness Act (the "CAFA"), the Judicial Conference's Advisory Committee on Civil Rules asked the Federal Judicial Center ("FJC") to study the impact of CAFA on the federal courts. In 2008, the FJC released its report, entitled "The Impact of the Class Action Fairness Act of 2005 on the Federal Courts," which focused primarily on class actions filed or removed under the federal courts' diversity of citizenship jurisdiction.[5] The FJC's interim findings[6] on class actions filings and removals confirmed that

[1] Portions of the Class Action Section were taken from the Memorandum in Opposition to Certification in the *In Re: FEMA Formaldehyde*, United States District Court for the Eastern District of Louisiana, Docket No. 07-MD-1873, Rec. Doc. 902.

[2] "…[A] consensus has begun to emerge" that courts retain jurisdiction over cases filed or removed under CAFA. *See Louisiana v. AAA Inc.,* CIV.A. 07-5528, 2011 WL 5118859 (E.D. La. 2011) citing *Samuel v. Universal Health Servs.,* ---- F.Supp2d ----, 2011 WL 3349826, a *2 (E.D. La. 2011). The Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have all held that a court retains jurisdiction over a case filed or removed under CAFA even if class certification is denied. *See Metz v. Unizan Bank,* 649 F.3d 492, 500–501 (6th Cir.2011); *Charter Corp. v. Learjet, Inc.,* 592 F.3d 805, 806 (7th Cir.2010); *Buetow v. A.L.S., Enters., Inc.,* 650 F.3d 1178, 2011 WL 3611488, at *1, n. 2 (8th Cir. Aug. 18, 2011); *United Steel Workers Int'l Union v. Shell Oil Co.,* 602 F.3d 1087, 1092 (9th Cir.2010); *Cunningham Charter Corp. V. Learjet, Inc.,* 592 F.3d 805,806–807 (7th Cir.2010); *Vega v. T–Mobile USA, Inc.*, 564 F.3d 1256, 1268 n. 12 (11th Cir.2009).

[3] 28 U.S.C. § 1407. Also see, Fallon, et al, "Bellwether Trials in Multidistrict Litigations, 82 Tul. L. Rev. 2323, 2324."

[4] "The term bellwether is derived from the ancient practice of belling a wether (a male sheep) selected to lead his flock. The ultimate success of the wether selected to wear the bell was determined by whether the flock had confidence that the wether would not lead them astray, and so it is in the mass tort context." Fallon, at 2324, citing *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997).

[5] "The Impact of the Class Action Fairness Act of 2005 on the Federal Courts," Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules, Federal Judicial Center, April 2008.

CAFA caused an increased number of class actions based on diversity of citizenship jurisdiction that were filed in the federal courts. Overall, the FJC found a 72 percent increase in class activity in the eighty-eight district courts studied when comparing the period January-June 2007 with July-December 2001. Much of that increase, however, was attributable to federal labor class actions and class actions under federal consumer protection statutes. Analyzing torts-personal injury class actions only during these same periods, the number of class actions declined from 52 in July-December 2001 to 35 in January-June 2007, a decrease of 33 percent. Personal injury class actions constituted 1.5 percent of class action activity in January–June 2007, down from 3.8 percent in July–December 2001. Since CAFA's effective date in February 2005, however, the FJC also observed an increase in the number of class actions initiated in the federal courts on the basis of diversity jurisdiction. It should be noted that the FJC's report does not specify the type of tort-personal injury class actions filed, but rather groups them together into a single category.

The FJCs most important findings included the following:

1. There was a dramatic increase in the number of diversity class actions filed as original proceedings in the federal courts post-CAFA. The CAFA average of such filings per month was 11.9; the post-CAFA average was 34.5 per month.

2. Diversity class action removals increased in the immediate post-CAFA period over their 2004 levels but have been trending downward since 2005. In the last months of the study period, diversity removals were at levels similar to those in the pre-CAFA period (see Power Point slides 2 and 3).

3. The increase in diversity class action original proceedings was widespread. Diversity class action original proceedings increased overall in the districts in eleven of the twelve circuits, when comparing filings for calendar years 2002 and 2003 with those for the last two years of the study period, July 1, 2005– June 30, 2007 (see Power Point slide 4). Diversity class action original proceedings also increased between the two time periods in all but one of the districts with substantial numbers of diversity class actions during the study period (see Power Point slides 5 and 6).

4. The results for diversity class action removals were more varied. Comparing removals in calendar years 2002 and 2003 with those in the last two years of the study period, the FJC found that they decreased in the last two years of the study period in five circuits (see See Power Point slide 4). However, when analyzing the districts separately, the FJC found that most of the districts with substantial numbers of diversity class actions experienced some increase in diversity removals (see Power Point slides 5 and 6).

5. The increase in diversity class actions was due largely to increases in the numbers of contracts, consumer protection/fraud, and torts-property damage class actions being

[6] Figures 1-7 in Appendix B of the April 2008 report provides various charts that show pre and post-CAFA comparisons in federal question and diversity jurisdiction filings. They are presented here as Power Point slides 1 – 7.

filed in or removed to federal court in the post-CAFA period. Torts-personal injury cases have not increased in the post-CAFA period (see Power Point slide 7).

The central question the FJC sought to answer was not just CAFA's impact on the number of federal class actions, but whether plaintiff's were choosing to file in federal court in large numbers or whether defendants were taking advantage of expanded diversity jurisdiction to remove additional cases. Based on its findings, the FJC ultimately concluded that the direct impact of the CAFA on the caseload of federal courts could be seen in the increased number of class actions filed in or removed to the federal courts based on diversity jurisdiction.

In the pre-CAFA period, diversity class action filings in the federal courts averaged 11.9 per month, and diversity class action removals, 17.2 per month. From March 2005 through June 2006, the average number of diversity class action filings increased to 33.3 per month, and the average number of diversity class action removals increased to 25.1 per month. In the last twelve months for which data was available, July 2006 through June 2007, diversity class action filings increased slightly, again, to average 36.0 per month. Diversity class action removals, on the other hand, decreased in the same time period, to 18.1 per month, a figure comparable to the number of diversity class action removals observed in the pre-CAFA period. Thus, one likely impact of the CAFA on the caseload of the federal courts has been a relatively large and apparently continuing increase in the number of class actions filed as original proceedings based on diversity of citizenship jurisdiction.

Although diversity class action removals, like filings, increased in the immediate post-CAFA period, the prevailing trend for such cases in both the pre-CAFA and post- CAFA periods was downward. Diversity class action removals initiated in federal court in the last twelve months of the study period remained at about the same rate as they were in the pre-CAFA period. The CAFA temporarily increased the number of diversity class action removals to the federal courts, especially in comparison with the immediate pre-CAFA period, when removals of such cases were few. But in both the pre-CAFA and post-CAFA periods, the trend had been for fewer class actions to be removed to federal court on the basis of diversity of citizenship jurisdiction.

The findings with respect to increased diversity class action filings strongly suggest that the CAFA has altered class action plaintiffs' forum choices, at least in some circumstances. The findings on removals also suggest a change in the choice of forum made by class action counsel. Correspondingly, the increased number of diversity class actions filed in the federal courts as original proceedings suggests that there were fewer cases in state court to remove.

Comparing the percent change in both diversity class action filings and removals in district courts between calendar years 2002 and 2003 and the final two years of the study period, July 1, 2005, through June 30, 2007, the number of diversity class actions filed as original proceedings in the district courts basically tripled, increasing by slightly more than 200 percent. During this period, the District Court for the Eastern District of Louisiana saw an elevenfold increase, primarily due to the number of class actions attributable to Hurricane Katrina. The number of diversity class actions initiated in state court and then removed, however, was relatively stable between the two time periods, increasing by only about 6 percent.

Relating specifically to personal injury class actions based on diversity of citizenship jurisdiction, the average number of personal injury class actions initiated in the federal courts actually dropped slightly in the post-CAFA period, from 7.30 per month pre-CAFA to 6.25 per month post-CAFA. This presents a different pattern from that for contracts and consumer protection/fraud class actions, where the average increase of each doubled and tripled, respectively.

In sum, class action activity in the federal courts increased dramatically during the study period. Much of this increase was in federal question cases. However, diversity class action filings also increased since February 2005, a finding consistent with the hypothesis of a CAFA effect. The post-CAFA increase in diversity class actions was not driven primarily by removals. Indeed, the last year of data makes that crystal clear. Most of the increases in diversity class actions occurred in the contracts and consumer protection/ fraud nature of suit categories. Lastly, it should be noted that the FJC's April 2008 report is the only official report that has collected and analyzed data regarding the CAFA's impact on federal court filings and the information contained therein is the most up-to-date data that has been released on the matter. All published articles and scholarly writings we found after the release of the FJC's report rely exclusively on the data contained in the April 2008 report.

Multidistrict Litigation as Per 28 U.S.C. § 1407 Regarding Mass Tort Actions

Since its creation, the Judicial Panel on Multidistrict Litigation (the "Panel") has considered motions for centralization in over 1950 dockets involving more than 250,000 cases and literally millions of claims therein. These dockets encompass litigation categories as diverse as single accidents, such as airplane crashes, train wrecks, and hotel fires; mass torts, such as those involving asbestos and hormone replacement therapy drugs; other types of products liability; patent validity and infringement; antitrust price fixing; securities fraud; and employment practices. See John G. Heyburn, A View from the Panel: Part of the Solution, 82 Tul. L. Rev. 2225, 2229-30 (2008).

The United States Judicial Panel on Multidistrict Litigation acted upon 43,769 civil actions pursuant to 28 U.S.C. § 1407 during the twelve month period ending September 30, 2011. The Panel transferred 5,593 cases originally filed in 91 district courts to 49 transferee districts for inclusion in coordinated or consolidated pretrial proceedings with 38,176 actions initiated in the transferee districts. In addition, the Panel did not order transfer in 42 newly docketed litigations involving 202 actions. Litigations involving sales practices and/or products liability litigations were again the most prevalent litigation type transferred during the 2011 fiscal year, comprising nearly half of the 47 transferred litigations.

Since the creation of the Panel in 1968, there have been 393,682 civil actions centralized for pretrial proceedings. As of September 30, 2011, a total of 12,419 actions had been remanded for trial, 398 actions had been reassigned within the transferee district, and 315,148 actions had been terminated in the transferee court. At the end of this statistical year, there were 65,717 actions pending throughout 57 transferee district courts.

In February 2010, Judge John G. Heyburn, Chair of the JPML, was interviewed by The Third Branch, the newsletter of the federal courts (available at, http://www.jpml.uscourts.gov/sites/jpml/files/The%20Third%20Branch%20-%20February-2010-Heyburn%20Interview.pdf), and was asked, among other topics, how the Panel's docket has changed, to which Judge Heyburn stated:

> The advent of the Class Action Fairness Act (CAFA) and evolving judicial views of class certification under Rule 23 have coincided to make centralization under Section 1407 an often attractive alternative for resolving complex aggregated claims. This apparent trend presents many challenges for the Panel and its transferee judges. Not surprisingly, many MDL cases are among the most complex and significant in the federal docket.
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> The Panel's docket is growing in sheer numbers, as the accompanying chart demonstrates. During the 1970s and 1980s, the Panel ruled, on an annual basis, on roughly 30 to 50 motions for centralization. In 1996, the number exceeded 60 for the first time, and between 2003 and 2006, the Panel received over 70 motions for centralization annually. This trend has only continued. In 2009, the Panel ruled on a total of 102 new motions for centralization—not including motions that were mooted or withdrawn. For the May 2009 hearing session in Louisville, Kentucky, the Panel received so many new motions for centralization (over 30) that—for only the second time in its history—it heard oral argument over two days rather than the usual one.

Considerations to Determine the Appropriate Transferee Court and Judge in MDL Cases:

Once the Judicial Panel deems that consolidation is appropriate, it will consider where the cases should be transferred. 28 U.S.C.A. § 1407. Section 1407 does not specify any criteria that the Judicial Panel must follow when designating the transferee court or the transferee judge; choice is left to the Panel's discretion. Id.; see In re Wilson, 451 F.3d 161, 173 (3d Cir. 2006) (The panel retains unusually broad discretion in carrying out its functions, including substantial authority to decide how the cases under its jurisdiction should be coordinated). The transferee judge can be from a district that is not the one to which the cases will be transferred. See § 1407. "The Panel likes to accommodate the parties in selecting an appropriate transferee district [and] if the parties or a group of them can make a joint recommendation, the Panel may be favorably impressed." See John G. Heyburn, A View from the Panel: Part of the Solution, 82 Tul. L. Rev. 2225, 2241 (2008).

Over the years, various lists of factors that are commonly used by the Panel when choosing the location of the transferee district have been published.[7] A representative list is as follows[8]:

[7] The Panel has indicated that sometimes a particular location may be of greater importance because of the nature of discovery and the concentration of witnesses. But, location may be a lesser consideration if the litigation does not have a geographical focal point. See John G. Heyburn, A View from the Panel: Part of the Solution, 82 Tul. L. Rev. 2225, 2239 (2008). Presumably, if location is not particularly important then the caseload of the possible transferee courts or judges will factor more heavily in the Panel's forum choice. See Wilson W. Herndon & Ernest R.

1. Convenience of the parties and witnesses[9];
2. Choice of a substantial number of the parties;
3. Location of relevant documents;[10]
4. Location of potential witnesses;
5. Location of parties or the principal place of business of the parties[11];
6. Where the greatest number of cases are pending or the number of involved actions pending in a district;
7. Whether discovery is at an advanced stage in one of the districts;
8. Where the greatest opportunity for state/federal coordination may exist;
9. The center of gravity of the litigation, if obvious;
10. Whether the district is centrally located;
11. The location of the first filed case;
12. The location of related grand jury proceedings;[12] and
13. Whether the district is an accessible location for nationwide litigation.

Finally, while parties can request a specific venue of an MDL, a request does not necessarily make the panel more likely to choose a particular venue. The Panel is alert to parties who may venture to use the MDL process for some substantive or procedural advantage, e.g., to litigate in a forum where the party could not get jurisdiction over another party, and the Panel will act to avert or deflect attempts to 'game' the system." Id. at 2241; see e.g., In re Truck Accident Near Alamagordo, New Mexico, on June 18, 1969, 387 F. Supp. 732 (J.P.M.L. 1975) (finding that despite the duplication of discovery that was readily apparent since all of the cases had common questions of fact arising out of the same accident, the motion was denied because

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Higginbotham, Complex Multidistrict Litigation – An Overview of 28 U.S.C.A. § 1407, 31 Baylor L. Rev. 33, 47 (1979).

[8]See Mary J. Cronin, Jesse P. Hyde & Edward B. Ruff, III, Multidistrict Litigation: Technical & Practical Considerations, FDCC (Federation of Defense & Corporate Counsel) Quarterly 403, Summer 2009, available at http://www.thefederation.org/documents/V59N4-Cronin.pdf.

[9]See e.g., In re Vioxx Prods. Liab. Litig., 360 F. Supp. 2d 1352 (J.P.M.L. 2005), the Panel found that "centralization under Section 1407 in the Eastern District of Louisiana would serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation." Id. at 1353-54.

[10]In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig., 469 F. Supp. 2d 1348, 1350 (J.P.M.L. 2006) (centralizing litigation in the District for the District of Columbia, in part because "most, if not all, discovery will likely come from the federal Government and documents and witnesses are likely to be in or near the District of Columbia").

[11]See e.g., In re Avandia Mktg., Sales Practices & Prods. Liab. Litig., 528 F. Supp. 2d 1339, 1341 (J.P.M.L. 2007) (holding centralization appropriate in the district where the defendant, a pharmaceutical manufacturer, had its principal place of business due to the location of witnesses and documents).

[12]See, e.g., In re Orthopaedic Implant Device Antitrust Litig., 483 F. Supp. 2d 1355, 1355-56 (J.P.M.L. 2007) (centralizing claims in the district where the grand jury proceedings were located), the existence of a qui tam action predicated on the same facts as those at issue in the MDL, see, e.g., In re Neurontin Mktg. & Sales Practices Litig., 342 F. Supp. 2d 1350, 1351-52 (J.P.M.L. 2004) (finding that centralization of the actions in the litigation was appropriate), the possibility of coordination with related state court proceedings, see, e.g., In re Gen. Motors Corp. Sec. & Derivative Litig., 429 F. Supp. 2d 1368, 1370 (J.P.M.L. 2006) (centralizing actions, in part, because of related state court proceedings), the location of the first-filed action, see, e.g., In re Mattel, Inc., Toy Lead Paint Prods. Liab. Litig., 528 F. Supp. 2d 1367, 1369 (J.P.M.L. 2007) (centralizing, in part, because the first-filed action had been pending in the transferee court), and the location of a majority of the actions. See, e.g., In re Air Crash Near Athens, Greece, on Aug. 14, 2005, 435 F. Supp. 2d 1340, 1342 (J.P.M.L. 2006) (noting that the transferee forum contained a majority of the actions in the dispute).

this problem could be avoided by cooperative efforts of the parties. Moreover, the Panel sensed that the dominant reason that the plaintiffs sought transfer to Oklahoma was because they could not get personal jurisdiction there over the defendant who manufactured and sold the trailer. According to the Panel, it appeared that "plaintiffs' ulterior motive for seeking transfer amount[ed] to an attempted misuse of the statute.").

Each factor must be evaluated with reference to all of the other factors and with reference to the cases proposed for the multidistrict litigation docket. See Heyburn, 82 Tul. L. Rev. at 2240. "The ideal transferee court, according to [early Panel decisions] would be a district where many of the common facts occurred, where a number of cases are already pending, where some discovery has taken place, where a single judge is already familiar with the litigation, and where the judges and the court are not burdened by calendar problems."[13]

Choosing the best transferee court and the best judge to serve as transferee judge are closely related. See Heyburn, 82 Tul. L. Rev. at 2239. The difficulty can arise from an abundance of good options; the absence of them, or from tactical differences among the parties, even among parties ostensibly on the same side. Factors that are specifically related to choosing the judge are as follows:[14]

1. Whether there should be one judge or two;
2. Whether there is a judge in the suggested transferee district who is familiar with the case or a judge who has experience with one or more actions;[15]
3. Whether a member of the Judicial Panel should be chosen;
4. Whether there is a judge who has previous experience managing consolidated cases;[16] and
5. Whether there is a judge designated to sit specifically in the transferee district on an intracircuit or intercircuit assignment.

Once the Panel focuses on a particular judge, it will also consider whether the judge is willing to accept responsibility for the litigation; whether the judge's workload will permit him

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[13] See Stanley J. Levy, Complex Multidistrict Litigation and the Federal Courts, 40 Fordham L. Rev. 41, 56-57 (1971) (citing In re IBM, 302 F. Supp. 796 (J.P.M.L. 1969); In re Plumbing Fixture Cases, 295 F. Supp. 33 (J.P.M.L. 1968)).

[14] See Mary J. Cronin, Jesse P. Hyde & Edward B. Ruff, III, Multidistrict Litigation: Technical & Practical Considerations, FDCC (Federation of Defense & Corporate Counsel) Quarterly 404, Summer 2009, available at http://www.thefederation.org/documents/V59N4-Cronin.pdf .

[15] See In re Refco Sec. Litig., 530 F. Supp. 2d 1350, 1351 (J.P.M.L. 2007) (selecting the Southern District of New York, in part because "[m]any actions are already proceeding apace in the [the] district"); In re Nat'l Sec. Agency Telecomms. Records Litig., 444 F. Supp. 2d 1332, 1335 (J.P.M.L. 2006) ("We conclude that the Northern District of California is an appropriate transferee forum in this docket because the district is where the first filed and significantly more advanced action is pending before a judge already well versed in the issues presented by the litigation."); In re RC2 Corp. Toy Lead Paint Prods. Liab. Litig., 528 F. Supp. 2d 1374, 1375-76 (J.P.M.L. 2007) (centralizing fourteen actions in the United States District Court for the Northern District of Illinois, before Judge Harry D. Leinenweber, who was already assigned to seven of the nine actions that had been brought in that district).

[16] See, e.g., In re New Motor Vehicles Canadian Exp. Antitrust Litig., 269 F. Supp. 2d 1372, 1373 (J.P.M.L. 2003) (centralizing six actions in the United States District Court for the District of Maine before Judge D. Brock Hornby, even though no constituent action was pending in that district).

or her to handle the case,[17] and whether the chief judge of the district will consent to the transfer of additional cases to the district.[18] According to the current Chair of the Panel:

> [t]he ideal transferee judge is one with some existing knowledge of one of the cases to be centralized and who may already have some experience with complex cases, if the new docket appears to require it. For instance, a judge already assigned many of the transferee cases would be a likely choice, unless he or she is unable to devote the time to the combined transferee cases. On the other hand, the Panel may opt for an available experienced judge even though he or she does not sit in a district where one or more of the constituent actions were originally brought.

Heyburn, 82 Tul. L. Rev. at 2240.[19]

The willingness and motivation of a particular judge to handle an MDL docket are ultimately the true keys to whether centralization will benefit the parties and the judicial system. This may have little to do with the number of cases on the judge's docket and more to do with the presence of a few complex and time-consuming actions. The Panel may only become aware of such a circumstance via a telephone conference with that judge. Depending on the situation, considerable interplay, both direct and indirect, may take place between the Panel and the transferor and proposed transferee courts. The Panel may make informal contact with various transferor and transferee judges to clarify matters. See Heyburn, 82 Tul. L. Rev. at 2240-41.

Ultimately, the Panel's goal is to pair an experienced, knowledgeable, motivated, and available judge in a convenient location with a particular group of cases. The Panel therefore attempts to apply those factors in a given docket in the manner that will most benefit the litigants and the judiciary. The Panel's sole purpose is to benefit the system as a whole rather than a particular party or a particular point of view within the litigation. Clearly, such decisions involve considerable discretion and intuition. See Heyburn, 82 Tul. L. Rev. at 2241.

General Considerations in MDL Cases for Both Plaintiffs and Defendants?

1. An MDL provides a client with centralized, uniform discovery in one venue, which means that you can conduct discovery efficiently.

    a. Your client can save costs associated with (1) conducting discovery in many jurisdictions; (2) retaining local counsel in each venue to litigate individually discovery disputes; (3) coordinating and managing separate discovery proceedings in different venues; and (4) repeatedly producing company representatives for depositions in each individual case.

[17] The Panel considers both the number of cases on the judge's docket as well as whether the judge is handling complex and time consuming actions. Telephone conferences with transferor and transferee judges are not uncommon. Heyburn, 82 Tul. L. Rev. at 2240-41.
[18] Levy, 40 Fordham L. Rev. 41, 57.
[19] See Power Point slide 8, Top Ten District Courts to Which Total Number of Actions Were Transferred.

b. Your client can also better control discovery responses so that they don't diverge or create inherent inconsistencies in the company's position.

c. If your client is self insured or has an insurance policy under which defense costs erode the amount available to pay damages, cost factors may be important.

d. On the other hand, an MDL may require broader discovery than conducting discovery separately for each individual case because the plaintiffs involved in an MDL can have divergent claims, requiring broad discovery, which generally increases costs compared with discovery in individual cases.

e. Sometimes it is easier to successfully limit discovery for individual cases than for an MDL. You should carefully scrutinize the cost efficiency of an MDL for your client.

2. Conducting discovery in different jurisdictions would subject your client to varying and potentially inconsistent rulings.

   a. For example, if a company wants to properly protect documents from disclosure through some valid privilege, you may need to litigate the issue over and over again in different venues under different rules.

   b. It will only take one adverse ruling for the documents to become public, at which point they will quickly circulate among the plaintiffs' attorneys who will use them in every case.

   c. If you believe that a client may have a better chance of successfully defending its privilege position before an MDL court, litigating that issue once in that venue may be preferable.

   d. The company may still face state court litigation in which it may have to address the same privilege issue.

   e. However, a federal court ruling in an MDL may carry substantial weight.

3. Creating an MDL and the associated publicity may swell the number of claims.

   a. This may be your adversaries' goal, particularly if you previously defeated class certification in one or more of the transferred cases, which may be reason enough to vigorously oppose consolidation.

   b. In some cases, however, claims may have already swelled, for instance, if a company issued a product recall.

   c. So case consolidation into an MDL may actually help control the pace and progression of new claims.

4. If a company's end goal is to resolve all claims, consolidating all the federal cases into an MDL may create that opportunity.

    a. In some cases, companies have moved to create MDLs specifically to negotiate global settlements through the appointed plaintiffs' counsel committees under settlement matrices designed to compensate all potential claimants.

    b. While that strategy could lead to an influx of additional claimants, as mentioned above, plaintiffs' attorneys may already have trolled for potential claimants through advertising.

    c. Moreover, once claim values are set, some courts have eliminated large contingency fees arrangements on the theory that establishing a claim value eliminates the contingent nature of any fee arrangement and renders any such agreements unethical. See In Re Sulzer Hip Prothesis and Knee Prothesis Liab. Litig., 290 F. Supp. 2d 840 (N.D. Ohio 2003).

    d. This creates a disincentive among plaintiffs' attorneys to continue to solicit plaintiffs if their compensation is limited to an hourly fee.

    e. While the dynamic of the particular litigation must lend itself to this approach, settlement through MDL proceedings may be preferable to individual settlements and a potentially perpetual stream of claims.

5. Many plaintiffs' lawyers who pursue these cases in their local jurisdictions may have strategic advantages.

    a. MDL proceedings may force these lawyers out of their comfort zone and offer a client a strategic and perhaps geographical advantage.

    b. This is especially true if you can convince the Panel to assign venue to a court where your client is located for the convenience of company witnesses and company documents.

6. Because the MDL process gathers all the involved parties in a single forum, it often enhances or hastens the prospects of a global settlement.

Additional Considerations Regarding Discovery & Attorneys' Fees

The primary motivation for seeking centralization of multidistrict litigation is to save time and money by avoiding repetitive discovery and repetitive briefing of dispositive and class certification motions. Since a single transferee judge decides all pretrial disputes, not just those relating to discovery, consistent rulings occur and repetitive appeals of decisions on pretrial motions are avoided. Regarding repetitive discovery:

1. Duplicate discovery demands and requests are avoided.

2. Interrogatories have to be answered only once.

3. Witnesses have to be prepared and produced only once for depositions.

4. A document depository is typically created so that numerous sets of documents for each case do not have to be prepared.

5. Global settlement negotiations may replace individual settlement negotiations, and there is no need to prepare individual trial plans.

6. However, in certain cases these savings of time and money may be less than anticipated. When cases are transferred for a multidistrict litigation proceeding, discovery may be broadened into less relevant and more tangential areas reducing the anticipated cost savings for the defense.

One factor that sometimes leads to broadening discovery relates to how plaintiffs' attorneys' fees are computed if there is a settlement.

1. If attorneys' fees are based on individual contingent fee contracts, reasonableness may depend upon hours spent working on the case. This, in turn, can create an incentive to replace the duplicative discovery that is eliminated in a multidistrict litigation proceeding with additional, broader discovery.

2. However, this tendency may be less common now due to how transferee judges determine what percentage is reasonable for contingent fees. For example, in In re Vioxx Prods. Liab. Litig., the transferee court capped plaintiffs' attorneys' contingent fees at 32%. The court reasoned that multidistrict litigation created economies of scale that benefitted attorneys greatly and that the "justice mandate of the MDL statute requires that the claimants receive a similar benefit, in the form of reasonable attorneys' fees.

3. The cap applies to all attorneys unless an attorney can produce evidence showing that a rare circumstance exists that makes departure from the cap appropriate.

4. Also, the attorney's client is entitled to present contrary evidence at the hearing. Given the court's authority to order a capped, uniform contingent fee and the uphill battle an individual attorney faces when trying to increase it, plaintiffs' attorneys will be less likely to replace duplicative discovery with broader, less relevant discovery.

The following was obtained from: Lori L. Pines & Jessie B. Mishkin, A Strategic Approach to Multidistrict Litigation, N.Y. L.J., June 13, 2011, available at http://www.weil.com/news/pubdetail.aspx?pub=10371.

Defendants in MDL Cases: The Advantages:

1. A key advantage is that it can vastly simplify litigation management and logistical issues when numerous similar cases are pending concurrently. Counsel should always consider the number of cases pending and how many more may be filed. In some instances, tolling agreements are used to limit the number of cases that will be filed and subject to MDL consolidation. Three pending cases is typically enough for the Panel to transfer, and sometimes even two can suffice, but the more cases that are being juggled at one time, the more sensible it might be to seek MDL.

2. In many instances, MDL proceedings can save resources and make discovery more efficient. Counsel should assess whether the cases at issue are truly similar enough for one discovery effort, and whether an MDL will actually save costs, be easier to administer, and ultimately protect the client.

    a. For example, something as simple as coordinating case calendars so that answers, motions and discovery are filed on time can balloon in terms of cost and burden if they have to be tracked in several simultaneous matters, while a single coordinated effort in MDL can streamline the task and reduce the risk of default.

3. Furthermore, if each case is likely to involve the depositions of high level corporate officers, MDL can be an important tool for protecting those officers' time and testimony. Indeed, in an MDL proceeding, an order can be sought to limit an officer's deposition to one seven hour sitting (though the parties might seek more time in some cases), rather than forcing a witness to fly to various jurisdictions to be deposed again on the same facts.

    a. This type of discovery limitation helps prevent inconsistencies in the witness' testimony. Even an inadvertent change of phrasing from one deposition to another can be used to attack a witness' credibility.

4. Moreover, in a case with heavy e-discovery, discovery within the contours of an MDL can be particularly advantageous. A serious drawback to having similar cases pending before multiple judges is the risk that one judge will order a defendant to produce certain items, only to have a second judge order collection of a different set of items. Such inconsistencies can require a company to renew its collection efforts, dramatically driving up costs.

5. For all types of discovery, MDL also brings the benefit of a single document production protocol, and reduces the risk of having multiple privilege and confidentiality protocols in several cases. When discovery disputes do arise, having them resolved by one judge clearly helps avoid inconsistent rulings on common issues.

6. MDL proceedings can also help avoid inconsistent legal rulings. For example, inconsistent rulings on privilege waiver across forums could obviate the point of a

7. In some cases, MDL proceedings can facilitate settlement by bringing all the parties to the table in one forum. In fact, the MDL judge often insists on a steering committee of plaintiffs, and then encourages everyone to come to the table.

Defendants in MDL Cases: Downsides and Risks:

Despite the advantages noted above, MDL is not automatically the outcome that a defendant wants to encourage. There are potential downsides to MDL consolidation that should also be assessed by defense counsel.

1. One significant downside is that it could lead to a hostile forum. MDL consolidation is not an effective means of judge shopping. Counsel's first instinct is often to assess the law and the judges in each forum. But, MDL transfer always risks application of unknown law or an unfriendly judge.

2. There are signs that many counsel look for when weighing whether a particular judge is likely to be the transferee judge:

    a. Whether the judge is already assigned to one of the cases;

    b. Whether his or her docket is light, and

    c. Whether he or she has been known to take on MDLs.

    d. However, no counsel can know ahead of time whether the judge who gets called by the Panel will say yes or no to the transfer. That judge's response may have no correlation to his or her docket size or apparent comfort with MDL.

3. Therein lies one of the greatest disadvantages: Counsel may be risking moving a case that was once in a favorable venue to an unfavorable one, with almost no way to predict the outcome. In this respect, MDL is akin to a risky game of roulette. Consequently, making an uninformed decision to seek MDL can have serious negative consequences for a client, and using an MDL proceeding as a vehicle to get the perceived "best" judge on a case can be a serious mistake.

4. Beyond the risk of an unfriendly venue, MDL practice can result in the various cases ultimately going to trial before multiple judges with whom you have built up no rapport or credibility, and who have no long-term understanding of the facts.

5. Also, there is no guarantee that the cost savings discussed above will materialize. While MDL practice may eliminate duplicative discovery, it could also broaden it; well-

6. There may also be cases in which it is advantageous to push ahead in a non-MDL forum because a good result seems readily achievable. If a favorable outcome can be achieved quickly in a non-MDL court, then it makes sense to hold off on seeking an MDL, and then try to use that favorable outcome as precedent for a similar ruling from other courts or to apply settlement pressure. While an MDL can facilitate overall settlement, in some cases it can pressure defendants into incorporating even the weakest cases in the MDL into the settlement package.

Plaintiffs in MDL Cases: The Benefits:

1. An MDL may enable counsel for multiple plaintiffs to coordinate their attack and share the discovery burden.

2. In addition, a coordinated plaintiffs' team can more easily attract follow-on claimants.

3. The MDL vehicle can also help plaintiffs develop a better work product, especially since experienced counsel often take on the role of lead counsel.

4. An MDL might give the plaintiffs an organizational advantage. Without an MDL, it might be difficult and time consuming to coordinate dozens or hundreds of plaintiffs' lawyers from across the country, agree on leadership and litigation strategy, and equitably allocate both the work assignments and the work product. The scope of that effort alone might discourage some from even trying to organize voluntarily.

Other Considerations:[20]

Other factors that may trump the overall cost savings a multidistrict litigation proceeding should produce are (1) inconvenience for a particular party or witness, and (2) the initial uncertainty regarding where the cases might be transferred and which judge will be assigned.

1. Judicial convenience may sometimes trump the convenience of a party because as the Chair of the Panel has stated the "Panel's purpose is to benefit the judicial system and litigants as a whole, not any particular party."

2. Predicting where cases will be transferred and who the transferee judge will be is almost always impossible.

[20] See Mary J. Cronin, Jesse P. Hyde & Edward B. Ruff, III, Multidistrict Litigation: Technical & Practical Considerations, FDCC (Federation of Defense & Corporate Counsel) Quarterly 406-09, Summer 2009, available at http://www.thefederation.org/documents/V59N4-Cronin.pdf .

3. One reason is because there are so many factors taken into account by the Panel when making these decisions.

4. Another reason is that counsel will not be privy to some of the information used by the Panel when making its selections, such as whether a particular judge is willing to accept responsibility for the litigation, and whether the chief judge of a district will consent to a transfer of additional cases to the district.

5. Uncertainty regarding where the cases will be transferred may also implicate uncertainty regarding controlling law. Federal issues are decided according to the law of the circuit in which the transferee court is located.

6. This uncertainty is extra problematic since counsel must decide whether to move to transfer or oppose transfer not knowing whether the law of the eventual transferee court will be more favorable, less favorable, or the same as the law in the transferor court.

7. Consolidation may also curtail the "disaggregation advantage." This occurs because all consolidated cases proceed together. Therefore, the tactical strategies of accelerating "cases pending before preferred judges, or cases being prosecuted by weak opposing counsel" are no longer available for consolidated federal cases.

Predominance-Individual Causation

Plaintiffs must show that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3). Rule 23(b)(3) presents two primary issues, predominance and superiority. The text of the Rule presupposes that there are "questions of law or fact common to the members of the class."

Yet the mere existence of common issues does not mean that class certification is appropriate. The predominance test is "far more demanding" than the commonality test. *Unger v. Amedisys Inc.*, 401 F.3d 316, 320 (5th Cir.2005), citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24, 117 S.Ct. 2231, 2249-50, 138 L.Ed.2d 689 (1997). "To predominate, common issues must form a significant part of individual cases." *In re Vioxx Products Liability Litigation*, 239 F.R.D. 450, 460, (E.D.La. 11/22/2006), MDL No. 1657, citing *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 626 (5th Cir.1999).

The 5th Circuit has recognized that the certification of mass tort litigation is disfavored. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). Historically, courts have also noted that there are "inherent obstacles to personal injury class actions." *In re Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 853 (9th Cir. 1982) (citing cases). "Particularly in products liability actions individual issues may outnumber common issues. No single happening or accident occurs to cause similar types of physical harm or property damage. No one set of operative facts establishes liability. No single proximate cause applies equally to each potential class member and each defendant." *Georgine v. Amchem Prods.*, Inc., 83 F.3d 610, 628 (3rd Cir.

1996), *aff'd sub nom, Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (quoting *A.J. Robins Co., Inc. v. Abed*, 459 U.S. 1171 (1983)). "These factual differences translate into significant legal differences." *Id.* at 627.

"The predominance requirement of Rule 23(b)(3), though redolent of the commonality requirement of Rule 23(a), is 'far more demanding' because it 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Gene and Gene LLC v. BioPay LLC*, 2008 WL 3511766, 07-30195 at *4, (5th Cir.(La.), Aug 14, 2008) (citations omitted); *Unger v. Amedisys Inc.*, 401 F.3d 316, 320 (5th Cir.2005).

Courts have previously refused to certify a class action alleging formaldehyde exposure in mobile homes because the case presented issues that "will inevitably involve numerous individualized factual inquiries." *Brummett v. Skyline Corp.*, No. C 81-0103-L(B), 1985 U.S. Dist. LEXIS 19264, at *25 (W.D. Ky. June 3, 1985) (denying certification in a purported formaldehyde mobile home class action even where claims were limited to property damages); *see also Pearl v. Allied Corp.*, 102 F.R.D. 921 (E.D. Pa. 1984) (denying class certification in mobile home formaldehyde case); *Kuhn v. Skyline Corp.*, No. 83-0942, 1984 U.S. Dist. LEXIS 24589 (M.D. Pa. Aug. 3, 1984) (same). In *Brummett*, the court recognized that there are numerous environmental factors that affect the amount of formaldehyde gas released into the air. 1985 U.S. Dist. LEXIS 19264, at *25. Moreover, the health effects of formaldehyde will vary depending on the individual characteristics of a particular mobile home. *Id.* The court rejected the plaintiffs' contention that "the mere presence of formaldehyde supports liability" as defying reality. *Id.* The court found that "individual questions concerning causation would nullify the usefulness of a class action" and that the common questions do not predominate, precluding class certification. *Id.* *26-27.

The Fifth Circuit has used this reasoning in denying other personal injury class actions. In *Steering Committee v. Exxon Mobil Corp.*, 461 F.3d 598 (5th Cir. 2006), the Court affirmed the denial of a class action arising out of a fire at the defendant's facility. *Id.* at 605. The plaintiffs argued that issues relating to the defendant's liability relating to the single incident at the plant predominated over individual issues of causation and damages. *Id.* at 602. However, the Fifth Circuit court noted that "each individual plaintiff suffered different alleged periods and magnitudes of exposure and suffered different alleged symptoms as a result." *Id.* The district court concluded that "one set of operative facts would not establish liability and that the end result would be a series of individual mini-trials which the predominance requirement is intended to prevent." *Id.* Moreover, the damages for each plaintiff had to be determined subjectively and not on a class-wide basis. *Id.* The district court did not abuse its discretion in denying class certification. *Id.* at 604.

Critically, mass actions in Toxic Tort cases are usually not a single-disaster mass tort, but rather a complex product liability action where the factual and legal issues differ from individual to individual. *Cf. In re Phenylpropanolamine (ppa) Prods. Liab. Litig.*, 211 F.R.D. 435, 440 (D. Wash. 2002) (distinguishing a "typical" mass tort from a pharmaceutical product liability action in which individual questions exist).

In the Vioxx cases, Judge Fallon explained that the substantial issues of specific causation overwhelmed any issues of general causation, stating that the proposed trial of common issues "does not . . . eliminate the highly individualized inquiry of whether Vioxx specifically caused the injury alleged by each plaintiff in light of his or her medical history, family history, other risk factors, and use of the drug." *In re Vioxx*, at 462.

Judge Fallon cited a commentator in explaining that "Resolution of general causation is unlikely to affect the course of this litigation.":

> "Mass trials on the issue of "general" causation create substantial savings only when plaintiffs lose because this leads immediately to the dismissal of large numbers of mass tort claims, as the Bendectin case illustrates. Rarely, however, will a mass trial lead to the prompt entry of judgment in favor of a large group of plaintiffs against one or more defendants because even if the first jury finds, for example, that the defendant's product could have caused the plaintiff's injury, individual trials will still be necessary to determine specific causation, whether any affirmative defenses are available to the defendant, and the extent of the plaintiff's damages. Little or no time and expense will be saved in these individual trials by virtue of the preceding mass trial on general causation."

In re Vioxx, at 462 (citation omitted).

Judge Fallon distinguished mass-accident cases – even there, certification is only occasionally appropriate – and concluded that "The number, uniqueness, singularity, and complexity of the factual scenarios surrounding each case swamp any predominating issues." *In re Vioxx*, at 462-63.

This same reasoning has been applied in property damage and insurance coverage cases arising out of Hurricanes Katrina and Rita. In *Henry v. Allstate Insurance Co.*, the plaintiffs brought class action allegations against one defendant insurer for using a software package that undervalued claims of property damage resulting from the hurricanes. *Henry v. Allstate Ins. Co.*, No. 07-1738, 2007 WL 2287817, at *1 (E.D.La. Aug. 8, 2007). The district court granted the defendant's motion to strike[21] the class allegations, finding that predominance could not be shown. Citing other district court cases, the Court held that:

> Proving a questionable pattern and practice of undervaluing claims will require an intensive review of the individual facts of each member's damage claim, including the nature and extent of damage, the timing and adjustment of each class member's claim, how much each class member was paid for his claim and for what damage, and whether that amount was sufficient and timely. On the face of the pleading, it is clear that those individualized and highly personal issues pertaining to each class member patently overwhelm any arguably common issues, rendering the claims inappropriate for class treatment.

Id. at *4 (citing *Pollet v. Travelers Prop. Cas. Ins. Co.*, 2001 WL 1471724 (E.D. La. Nov.16, 2001)).The predominance requirement "is the test of cohesion, and it is demanding. To predominate, common issues must form a significant part of individual issues." *Id.* *3.

The Fifth Circuit analyzed similar issues with respect to asbestos, and held:

> We find it difficult to fathom how common issues could predominate in this case when variations in state law are thoroughly considered . . . . Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma a disease which, despite a latency period of approximately fifteen to forty years, generally kills its victims within two years after they become symptomatic. Each has a different history of cigarette smoking, a factor that complicates the causation inquiry. . . . These factual differences translate into significant legal differences. Differences in amount of exposure and nexus between exposure and injury lead to disparate applications of legal rules, including matters of causation, comparative fault, and the types of damages available to each plaintiff.

Castano v. American Tobacco Co., 84 F.3d 734, 743 (5th Cir. La. 1996)).

As long as Individual trials will be required to determine whether each plaintiff is entitled to recover no common issue can really predominate.

Superiority

Rule 23(b)(3) requires that a district court find "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The "superiority" analysis includes four factors: (A) the class members' interests in individually controlling the prosecution of separate actions; (B) the extent and nature of litigation concerning the controversy already begun by class members; (C) the desirability or undesirability of concentrating the litigation in the particular forum; and (D) the likely difficulties in managing a class action. F.R.Civ.P. 23(b)(3); *In re Vioxx*, 239 F.R.D. at 463.

Judge Fallon summarily disposed of any notion that the class action format was superior in *Vioxx*, simply stating:

> "In this case, the difficulties in class management overwhelm any efficiencies that could be secured through classwide adjudication. Indeed, 'the predominance of individual issues relating to the plaintiffs' claims for compensatory and punitive damages detracts from the superiority of the class action device in resolving these claims.' *Exxon Mobil Corp.,* 461 F.3d at 604-05; *see Allison,* 151 F.3d at 419; *Castano,* 84 F.3d at 745." *In re Vioxx,* 239 F.R.D. at 463.

The predominance of individual issues detracts from the superiority of the class action device. Indeed, litigating an individual case should be relatively simple since it could be narrowly focused on a specific model, specific manufacturer, specific exposure, and unique problems of the plaintiff. *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996). A court may also use case management tools—uniquely available in this MDL forum—to streamline and manage the litigation. *Exxon Mobil Corp.*, 461 F.3d at 604-05 (noting with approval the district court's use of consolidated summary judgments and Lone Pine orders in efficiently managing the litigation). This case should be managed with other tools, which will allow the full development of the individual issues while conserving judicial resources that could facilitate the discovery of any common issues.

INJUNCTION – Rule 23(b)(1)(A) - THE END RUN AROUND CERTIFICATION

Certification under Rule 23(b)(1) does not apply to actions seeking compensatory damages; rather, it applies to actions seeking injunctive or declaratory relief. *See, e.g., In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1545 (11th Cir. 1987). "Underlying is the concern that if compensatory damage actions can be certified under Rule 23(b)(1)(A), then all actions could be certified under the section, thereby making the other sub-sections of Rule 23 meaningless, particularly Rule 23(b)(3)." *Id.* This action is a mass tort claim in which Plaintiffs are seeking compensatory and punitive damages. Plaintiffs will often seek incidental injunctive relief to further their case for Certification.

SINGLE PLAINTIFF TRIALS-DUE PROCESS

In an adjudicatory setting, before liability may be imposed on a civil defendant, if facts are in dispute, due process requires a "meaningful" and fair opportunity to present arguments and evidence in support of one's defense. *See Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) ("persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard"). The term "meaningful" is not defined, but we can make an argument that it contemplates the basic sorts of protection associated with a trial, including the opportunity to present a direct and particularized response to individual claims. (The Due Process Clause protects defendants as well as plaintiffs, and has long been viewed as "preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed rights."DD' *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 (1982) (quoting *Boddie v. Connecticut*, 401 U.S. at 380)).

Cases in Multidistrict Litigation Cannot be Consolidated for All Purposes

The Ninth Circuit in *In re Korean Air Lines Co., Ltd*., 642 F.3d 685, 699-700 (9th Cir. 2011) recently held that as a general rule in multidistrict litigation, a transferee judge can handle all types of transferor court, but the MDL transferee court does not have authority to transfer a case to itself for trial, *Id. citing Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998), nor may it consolidate actions for all purposes, as might be proper in other circumstances pursuant to Federal Rule of Civil Procedure 42, *see* Wright et al., *Federal Practice & Procedure* § 3866. The court stated that "within the

context of MDL proceedings, individual cases that are consolidated or coordinated for pretrial purposes remain fundamentally separate actions, intended to resume their independent status once the pretrial stage of litigation is over." *In re Korean Air Lines Co., Ltd.,* 642 F.3d at 700.

The court explained that where the case is initiated in the transferee court's district, the district court's jurisdiction is not always similarly circumscribed to purely pretrial proceedings. *See In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.,* 333 F.3d 763, 767 (7th Cir.2003) (district court had original jurisdiction where complaint was filed in that district, and was not acting as a transferee court under 28 U.S.C. § 1407 with respect to this complaint). In such a case, the district court's jurisdiction beyond pretrial matters is part of its original jurisdiction, not the MDL jurisdiction. Nevertheless, "considerations that animate the restrictions placed on a transferee court's exercise of jurisdiction over its MDL docket—including the principle that individual cases remain separate actions despite being coordinated or consolidated for pretrial purposes—do not dissipate because a particular case was filed in the MDL's home district. *In re Korean Air Lines Co., Ltd.*, 642 F.3d at 701, n13.

Cases Declining to Consolidate Cases Based on Prejudice and Jury Confusion

The issue of consolidation of plaintiffs for trial has most often arisen in asbestos litigation. Jurists have wrestled with the fairness of combining cases involving long time periods, multiple theories of recovery, multiple sites, multiple products, multiple types of injuries, as well as multiple defendants and plaintiffs under traditional standards for consolidation.

For example, in *Malcolm v. National Gypsum Co.,* 995 F.2d 346, 354 (2d Cir. 1993), the court found the consolidation of 48 asbestos claims improper, where, among factors unique to asbestos cases, the number of cases affected, with the maelstrom of facts, figures, and witnesses, with 48 plaintiffs, 25 direct defendants, numerous third-and-fourth party defendants, and evidence regarding culpable non-parties and over 250 worksites throughout the world was likely to lead to jury confusion. Even where the district court takes precautions to assure that each case maintained its identity, the sheer breadth of the evidence can make these precautions feckless in preventing jury confusion. *Id., also citing In re New York Asbestos Litig.,* 145 F.R.D. 644, 653 (S.D.N.Y.1993) (consolidating twelve cases).

The court in *In re Ampicillin Antitrust Litig.,* 88 F.R.D. 174, 177 (D.D.C. 1980), upon considering memoranda by counsel on possible mode of trial, also refused to consolidate cases on the grounds of likely prejudice "as well as virtually unavoidable jury confusion," *Id*, also noting that "where numerous issues are not common to all parties, or where any party will be prejudiced by a joint trial, consolidation, rather than separate trials, is improper." *Id*. citing *National Resources Defense Council, Inc. v. Hughes,* 454 F.Supp. 148 (D.D.C.1978); *Meeder v. Superior Tube Co.,* 72 F.R.D. 633 (W.D.Pa.1976); *Cohn v. District of Columbia National Bank,* 59 F.R.D. 84 (D.D.C.1972).

The court in *Cain v. Armstrong World Indus.,* 785 F. Supp. 1448, 1455 (S.D. Ala. 1992) held that consolidation of ten personal injury lawsuits and three wrongful death lawsuits, involving exposure to asbestos by workers, was prejudicial to rights of asbestos manufacturers even though special measures were taken such as furnishing of notebooks to jurors, cautionary

instructions, and special interrogatory forms; similarities of awards made to various complainants, despite considerable differences in proof, and overall "exorbitant" awards in view of proof offered, indicated that jury had not carried out judge's instructions, stating that the "Try-as-many-as-you-can-at-one-time" approach is great if they all, or most, settle; but when they don't, these litigants can overwhelm a jury with evidence, which may not even have been admissible in any single plaintiff's case, if they were tried separately. "A process had been unleashed that left the jury the impossible task of being able to carefully sort out and distinguish the facts and law of thirteen plaintiffs' cases that varied greatly in so many critical aspects… Defendants did not receive a fair trial."

The court therefore granted new trial on each claim. *Cain v. Armstrong World Industries,* 785 F. Supp. 1448, 1457 (S.D. Ala. 1992) *In re Seventh Judicial District Asbestos Litigation,* 744 N.Y.S. 2d304 (N.Y. Sup. Ct. 2002) (denying consolidation of four separate asbestos actions due to prejudice to defendants); *Amchem,* 521 U.S. at 625; *see also Ortiz v. Fibreboard Corp.,* 527 U.S. 815 (1999) (Rejecting attempts to treat the multitude of asbestos cases as a certifiable class, noting that aggregation of such cases is inappropriate where "individual stakes are high and disparities among class members great").

While most of the reported decisions concerning consolidation of mass tort litigation have involved asbestos, at least one federal appellate court, *See In re Repetitive Stress Injury Litig.,* 11 F.3d 368, 373 (2d Cir.1993), concluded that the consolidation of large numbers of disparate claims against different manufacturers was an abuse of discretion, even for discovery purposes. *See id.* at 373–74. The plaintiffs were engaged in many different occupations and suffered from injuries and conditions that varied widely and could have been caused by something other than the defendants' conduct. *See id.* at 374. The defendants manufactured or distributed "a variety of mechanical devices with differing propensities, if any, to cause the harm alleged." *Id.* at 373. Reiterating that convenience and economy must yield to a paramount concern for a fair and impartial trial, the Second Circuit admonished: "The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation." *See In re Repetitive Stress Injury Litig.,* 11 F.3d 368, 373 (2d Cir.1993) quoting *In re Brooklyn Navy Yard Asbestos Litig.,* 971 F.2d 831, 853 (2d Cir.1992)).

Cases Permitting Consolidation in Multidistrict Litigation Context do so Only Where Facts are Straight Forward and Jury Confusion Can be Eliminated

An example where a multidistrict case resulted in consolidated issues and a bifurcated trial is *In re Air Crash Disaster at Stapleton Intern. Airport, Denver, Colo., on Nov. 15, 1987.,* 720 F. Supp. 1455, 1458-59 (D. Colo. 1988), where the court specifically noted that its approach "is appropriate for determination of liability issues in air crash cases where all plaintiffs were allegedly injured by a single set of acts." *Id.* citing *Winbourne v. Eastern Airlines, Inc.,* 632 F.2d 219, 227 (2d Cir.1980); *see, e.g., Dispenza v. Eastern Airlines, Inc.,* 508 F.Supp. 239, 242 (E.D.N.Y.1981); *In re Multidistrict Civil Actions Involving Air Crash Disaster Near Hanover, N.H.,* 314 F.Supp. 62, 63 n. 1 (J.P.M.L.1970). Because the case dealt with air crash litigation, bifurcation of liability issues from compensatory damages did not give rise to constitutional, procedural, or practical difficulties. *In re Air Crash Disaster at Stapleton Intern. Airport,*

Denver, Colo., on Nov. 15, 1987 citing Martin v. Bell Helicopter Co., 85 F.R.D. 654, 657–61 (D.Colo.1980) (analyzing various issues); *see also Dispenza v. Eastern Airlines, Inc.,* 508 F.Supp. 239, 242 (E.D.N.Y.1981); *Manual for Complex Litigation, Second,* §§ 33.23, 33.26 (1985).

Moreover, the court in *In re Air Crash Disaster at Stapleton Intern. Airport, Denver, Colo., on Nov. 15, 1987,* specifically noted that consolidation of two cases for the determination of consolidated issues of liability would not not present insurmountable problems of jury confusion which could not be addressed through a combination of appropriate jury instructions and verdict forms. *Id.* citing *In re Viatron Computer Systems Corp. Litigation,* 86 F.R.D. 431, 433 (D.Mass.1980) (joining two multidistricted cases for representative trial under federal securities law). The two cases involved were relatively straightforward claims for negligence and loss of consortium, and the court believed that juries are able to determine factual issues involving several plaintiffs where a common accident is alleged to have caused various injuries. *In re Air Crash Disaster at Stapleton Intern. Airport, Denver, Colo., on Nov. 15, 1987 citing Martin v. Bell Helicopter Co.,* 85 F.R.D. 654, 656 (D.Colo.1980) (empaneling two juries for consolidated trial of liability in an air crash case).

DAUBERT AT THE CLASS CERTIFICATION STAGE

The U.S. Supreme Court has accepted writs and should address the question in *Behrend v. Comcast Corp.* The underlying opinion can be found at 655 F.3d 182 (3d Cir. 2011). The matter is set to be argued on November 5.